Jacobo Marti & Sons, Inc. *and* **Walter W. Holler.**
Case 6-CA-12995

May 12, 1981

DECISION AND ORDER

On September 26, 1980, Administrative Law Judge Russell M. King, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support thereof, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Jacobo Marti & Sons, Inc., New Wilmington, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with plant closure if they become represented by a union.

WE WILL NOT promise employees increased wages and better working conditions if they refrain from supporting a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

JACOBO MARTI & SONS, INC.

DECISION

RUSSELL M. KING, JR., Administrative Law Judge: This case was heard by me in Sharon, Pennsylvania, on June 26, 1980. The initial charge was filed by Walter W. Holler, an individual, on December 17, 1979, and an amended charge was filed on February 11, 1980. The complaint was issued by the Regional Director for Region 6 of the National Labor Relations Board (herein called the Board) on behalf of the Board's General Counsel on February 28, 1980, alleging certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (herein called the Act) in September 1979, including the unlawful discharge of Holler on September 19, 1979.[1] Respondent denies the violations and contends it discharged Holler for good cause. Respondent also defends on jurisdictional grounds and argues that the alleged violations of Section 8(a)(1) of the Act should be dismissed as being beyond the 6-month period of limitation provided for in Section 10(b) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses,[2] and after due consideration of the briefs filed herein by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

A. *Basic Facts*

Respondent contests jurisdiction in this case on constitutional grounds. It contends that the Board is prohibited from asserting jurisdiction by virtue of the first amend-

[1] All dates hereafter are in 1979, unless otherwise indicated. The pertinent parts of the Act provide as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
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> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[2] The facts found herein are based on the record as a whole and upon my observation of the witnesses. The credibility resolutions herein have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B.* v. *Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony has been reviewed and weighed in light of the *entire* record.

ment because of its relationship with a religious organization, the Farmers' Cheese Co-operative Association (herein called the Association).

The pleadings, testimony, evidence, and admissions herein establish the following jurisdictional facts.[3] Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania, with an office and place of business in New Wilmington, Pennsylvania, where it is engaged in the manufacture and retail sale of cheese and related products.

The land and buildings in which the cheese processing and production plant is located are owned by Respondent corporation, having been purchased from Jacobo and Mary Jane Marti who in turn had purchased said land and buildings from the Association pursuant to a provision in Jacobo Marti's original agreement to manage the plant for the Association. Respondent owns or leases all of the equipment and machinery used in the plant. The Charging Party herein, Walter W. Holler, was an employee of Respondent at the cheese processing plant. The plant employs approximately 89 persons, approximately 20 of whom are members of the Association and of the Amish faith. Because of the Amish tenets of the Association and pursuant to the cheesemaker agreement, Respondent employs all such persons and is fully responsible for all of the operating costs and expenses of the plant. In turn, Respondent receives a manager's commission from the Association, based on cheese production and sales of the Association. All of the cheese processed and produced at the plant is and remains the property of the Association, from its delivery as raw milk through its ultimate sale as a finished cheese product. Respondent does not process or produce any milk or cheese except that of the Association. During the calendar year ending December 31, 1979, Respondent received a total of $4,170,809 from the Association as its manager's commission. The commission is paid to Respondent by the Association on a monthly basis, determined by the sales of the Association during that month. During the calendar year ending December 31, 1979, Respondent purchased goods and materials valued in excess of $50,000 for use at its cheese processing and production plant, which were shipped to the plant directly from points outside the Commonwealth of Pennsylvania.

Pursuant to a separate agreement, Respondent provides an office staff to manage and maintain the books and accounts of the Association for its cheese sales. During the calendar year ending December 31, 1979, the Association derived gross revenues from sales of cheese products well in excess of $500,000 and shipped cheese products valued in excess of $50,000 directly from Respondent's New Wilmington, Pennsylvania, facility to points located outside the Commonwealth of Pennsylvania.

The Farmers' Cheese Co-operative Association was formed by the Amish farmers in the New Wilmington area for the purpose of marketing the agricultural products of its members. The Association is in the control of members of the Amish faith, who constitute most of its membership. The Association is a separate and distinct business enterprise from Respondent, but employs Respondent pursuant to a cheesemaker/manager contract to process its raw milk into cheese and cheese byproducts.[4]

Respondent is also engaged in a second separate and distinct business called the "Cheesehouse." The Cheesehouse is a store located in New Wilmington, Pennsylvania, which is engaged in the retail sale of cheese and other products. The Cheesehouse employs two to three persons on the average and is not directly involved in this proceeding except to the extent that it is a business of Respondent. The products sold by the Cheesehouse are not those of Respondent's plant or other operation, or of the Association. All sales of the Cheesehouse are made directly within the Commonwealth of Pennsylvania at the New Wilmington store. During the calendar year ending December 31, 1979, the gross volume of business from retail sales of the Cheesehouse was $524,658. The Cheesehouse is located in a building and on land which is leased by Respondent corporation from Jacobo and Mary Jane Marti.[5] The Association has no interest in the Cheesehouse.

At the time of the initial agreement between Jacobo Marti and the Association in 1955, Jacobo Marti was hired to manage the plant and to do certain other acts prohibited by the Amish faith which the Association could not itself undertake. Respondent corporation has since assumed the performance of that agreement.[6] The Association operates pursuant to bylaws which refers to Respondent corporation as the "cheesemaker."[7] The board of directors and officers of the Association all are, and always have been, members of the Amish sect. Because of their religion, Respondent's 20 Amish employees are not permitted to enjoy certain of the fringe benefits enjoyed by the non-Amish employees. They are paid the same wages as the non-Amish employees. The Amish are not permitted to work on Sunday, or past 8 p.m. on any other day. During an organizational campaign in 1973, the Association informed Respondent that, because of the tenets of the Amish religion, it would terminate its agreement with Respondent should Respondent's employees organize, form, or join a labor organization. Neither Respondent corporation nor Jacobo Marti has an interest in, or is a member of the Association. No stockholder or officer of Respondent corporation is a member of the Amish faith.

B. *Legal Analysis and Conclusions*

The original agreement between the Association and Marti alone was in 1955. In 1957 the Martis purchased the land and plant building from the Association, formed

[3] Counsel entered into an extensive written stipulation containing numerous facts regarding jurisdiction. That stipulation was admitted as Jt. Exh. 1.

[4] A copy of the original agreement was admitted into evidence. It was executed in 1955, and was between the Association and Jacobo Marti, alone.

[5] Jacobo Marti and his wife Mary Jane are co-owners of Respondent corporation.

[6] There is no written agreement to this effect in evidence. It is contained in the stipulation. Other than the stipulation, there is no explanation for inconsistancies in the original agreement in light of the new arrangement when Respondent corporation was formed in 1967.

[7] A copy of those bylaws were admitted into evidence.

their own corporation, and sold the plant to that corporation. Respondent corporation rents or owns all of the equipment and machinery in the plant, hires and pays all employees, and is fully responsible for all operating costs and expenses of the plant. The raw material and finished milk and cheese products milk and cheese remain the property of the Association, and the Association markets the cheese. Respondent obtains and uses only milk furnished by the Association. Most members of the Association are Amish, but some are not. Respondent's profit is a "commission" or payment from the Association based on gross cheese sales less current wholesale prices plus a fixed amount, which wholesale price and fixed amount reverts directly to the Association. In other words, the gross profits are divided, although not necessarily equally, between Respondent and the Association. Respondent maintains the plant, equipment, and pays salaries out of its share of the gross profits.

Respondent argues in this case that the Association is an exempt entity, that is exempt from the Board's jurisdiction for religious reasons, and that this exemption flows to Respondent because of its close ties with the Association. I disagree. I find that the Association is just that, a formal association of area farmers for the purpose of marketing their products. Its members are in the main of the Amish faith or religion, as are all of its directors, but it is not church sanctioned or "church operated." The Association is a Pennsylvania corporation. Its bylaws reflect that it is a business corporation, without mention of any religion or religious faith whatsoever. The religious exemption from the Act is a narrow one, requiring direct and absolute affiliation, and in complete pursuit of religious beliefs and purposes. Such is not the case here.[8] Notwithstanding, in my opinion, a conclusion contrary to the above still would not place Respondent under the umbrella of exemption. Not only is Respondent clearly included within the definition of an "employer" in Section 2(2) of the Act, I find that Respondent has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.[9] Respondent owns the land, plant building, and fixtures. It exclusively controls, disciplines, hires, fires, sets and pays the salaries of its employees. It essentially controls the terms and working conditions of its employees, including the setting or granting of such benefits as health plans and pensions. Respondent points out that it has agreed to and does employ 20 individuals of the Amish faith among its 90 some employees, and their beliefs are contrary to the potential results of employee union representation. However, the religious beliefs of these employees cannot serve to deprive the balance of Respondent's employees from their rights under the Act. In my opinion their beliefs are superseded in this case.[10]

Respondent also argues in this case that if the Board asserts jurisdiction, and subsequently the employees become represented by a union, Respondent would lose its Amish connection and go out of business. Respondent asserts that such a result would be contrary to the purpose of the Act. This argument is also without merit. Although Personnel Manager Miller told employee Holler that the plant could not "function" without the Amish, Owner-President Marti, himself, in his testimony refuted any such result, indicating that the worst result would be "disruption." Additionally, Respondent has chosen to operate in the industrial public market place, and place itself in interstate commerce.[11] Having done so it has subjected itself to much Federal and state legislation designed not for its protection but for the protection of others. It is not at liberty to exclude adherence to a particular law to facilitate its business practices and preferences, even if admirable.

I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Charging Party, Walter W. Holler, was thus an "employee" within the meaning of Section 2(3) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Summary of the Evidence*[12]

Walter W. Holler was hired by Respondent in August 1978 as an assembly line worker. He was discharged September 18. Prior to September, Holler related that he had only received one written warning and that was by Plant Superintendent Ronald Miller in October for absenteeism. In August he had also received a verbal complaint from Respondent's president, Jacobo Marti, for leaving the assembly line when he was making boxes. Holler indicated that this complaint was made by Marti because Marti desired that he remain on the line at all times as he was the fastest employee at making boxes, which was his usual job on the assembly line.

In early September, Holler, himself, concluded that he would initiate a drive to bring a union into the cheese plant. He had not yet contacted any union or union representative. On approximately September 3 at a gathering of some 15 employees in the lunchroom, he suggested that they try to get a union into the factory because of working conditions. According to Holler, present at this lunchroom meeting was also his assembly line supervisor, Jim Defendorf. Holler related that over the next 2 weeks he participated in three more talks or group meetings with other employees in the lunchroom, in the parking lot, and in a restaurant across the street from the

[8] Cf. *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[9] See *National Transportation Service, Inc.*, 240 NLRB 565 (1979), where the Board established the new "right of control" test in place of the "intimate connection" standard (Members Penello and Murphy dissenting); applied in *Loma Prieta Regional Center, Inc.*, 241 NLRB 1071 (1979).

[10] See *Beatrice Linscott* v. *Millers Falls Company, et al.*, 440 F.2d 14 (1st Cir. 1971), citing *Railway Employees' Department American Federation of Labor, et al.* v. *Hanson, et al.*, 351 U.S. 225 (1956).

[11] It is clear and uncontroverted that Respondent satisfies the Board's jurisdictional amounts for both retail and nonretail enterprises.

[12] The following includes a summary of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related, without credibility determinations unless indicated, and does not necessarily reflect my ultimate findings and conclusions in this case. Certain errors in the transcript are hereby noted and corrected.

plant.[13] Holler testified that on September 10 Marti approached him and accused him of being the "ring leader." Soon after he was called into Personnel Manager Miller's office, whereupon Miller asked him "how far had [they] gone with the union," to which he replied that it was thus far "all verbal." According to Holler, Miller then stated that a union would "close our doors," that the Company could not afford a union, and that the Amish employees would not let a union come into the factory. Holler then complained to Miller about not getting a recent open position in the factory, and Miller insured him that thereafter all jobs would be posted and thereafter awarded to "the one who deserves it . . . by seniority, from here on out."[14] Holler then related that Miller outlined a plan to form an in-plant employee committee with one person from each department, indicating that they were going to try to improve working conditions and pay, and Miller suggested that Holler go back and explain these plans to the other employees.

Holler testified that the following day, September 11, he was wrapping cheese on the line and Miller approached him, accused him of slowing down the line by talking too much to other employees, and assigned him to work in the "hot box." The hotbox was a room where the cheese was actually produced and put through a "cooker," and where approximately 9 to 11 employees worked on a daily basis. According to Holler, he had been assigned to the hotbox approximately four to five times previously but in his opinion the hotbox was an undesirable assignment, and that he had complained about such assignments in the past. Holler went on to explain that the temperature in the hotbox reached as high as 115 to 120 degrees, although he conceded that Marti himself worked in the hotbox "quite often," further relating that in the winter the hotbox could possibly be considered as a desirable assignment as there was no heat in the rest of the plant and that in parts of the plant the temperature reached as low as 10 degrees. Holler further conceded that many of the other employees were assigned to the hotbox "about once a week." Later in the day on September 11, Holler was talking to two other employees in the hotbox regarding a union when Marti walked in and "screamed" at him stating "[D]amn it, you were put in here to keep away from the rest of the guys, and shut up, you can't listen." The following 2 days, September 12 and 13, Holler indicated that he was again assigned to work in the hotbox, approximately one half of his working time each day.

Holler testified that on September 18 Line Foreman Defendorf approached him and employee Raymond Chropac and admonished them not to talk to a third employee named "Peter Rabbit," Holler then indicating that both he and Chropac ceased the conversation. According to Holler, several minutes later while he was talking to employee Joe Reed, Marti approached and again told him to stop talking and to resume making boxes, and as Marti was walking away he yelled "he can't ever shut up." A few minutes later Holler related that he asked Reed for some new tape for his "taper" and Marti again approached, reminding him "about shutting up," and abruptly started "screaming" at him. He then asked Marti why he was screaming at him and Marti replied "you don't tell me what to hell to do, as a matter of fact, get the hell out of here, I don't need you." Later on in the day, Personnel Manager Miller came to him on the line and told him he was fired and to go obtain his timecard. Holler testified that throughout his employment and prior to September he would frequently talk to other employees, that he knew of no company rule or policy against such talking, and was never previously disciplined for such conversations.[15]

Ronald J. Miller had been the personnel manager for Respondent for 6 years.[16] Contrary to Holler's testimony, Miller related that he learned of Holler's union activities early in the summer, in either June or July. On gaining this knowledge, a call was placed to Respondent's attorney, Merle Hart, and advice was obtained as to how to handle the situation involving Holler.[17] As a result of this advice, Miller testified that he immediately talked to Holler about his activities, whereupon Holler denied that he had talked about a union with other employees, but notwithstanding this denial, Miller indicated that he proceeded to discuss the advantages and disadvantages of a union in the plant, urging that a union was not needed. He explained the present benefits to Holler and although he stated that Respondent could not presently increase these benefits, he talked in terms of the employees increasing production with a resulting pay increase. Miller conceded that he could have talked about a "committee" and further admitted that he brought up Respondent's relationship with the Amish, making it clear that if a union came into the plant the Amish could no longer work at the plant or furnish the plant milk, and that the plant would thus be out of business. Miller denied any outright threat to close if a union came in, but related that it was his desire that Holler understand the ultimate result. Miller indicated that, after this discussion with Holler in June or July, he heard nothing further about a union or any union activities.

Miller testified that Holler was given one "written violation" for absenteeism earlier in his employment, and thereafter the situation "straightened out." Beginning in March, Miller indicated that he began to have problems with Holler "disrupting the line" by talking to other employees and that thereafter, at least once a month, he would talk to Holler about the problem. Regarding Holler's assignment to the "hot box," Miller admitted that he assigned Holler to this station in September because he needed additional help there, and also because Holler

[13] Former employee Jeffry Dallas initially testified that Holler approached him once in "September" in the lunchroom when he was alone about a union. On cross-examination, Dallas' testimony became unexplainably confused and conflicting. He changed the year of the conversation from 1979 to 1978, then back to 1979 and ending again with 1978. Dallas had been discharged in December 1979 for absenteeism.

[14] Holler testified that almost 50 percent of the employees had been hired after he was hired and that he had wanted the open position (the "sewage job") but that someone else had been chosen for the job.

[15] Former employee Dallas testified that he and other employees talked while working and he knew of no reprimands for such talking.

[16] The complaint alleges that Miller was the "plant superintendent." During his testimony, Miller was somewhat uncertain as to his exact title but referred to himself as the "personnel manager."

[17] Hart also testified in this case and labeled himself as being engaged in "labor consultation, primarily arbitration."

was at that time again disrupting the line. Miller explained that the average temperature of the hotbox was between 85 and 90 degrees, but with high humidity. He related that the remainder of the plant is heated "to some extent," but does get cool during the winter with the lowest temperature approaching 45 to 50 degrees. Miller indicated that a temperature of 10 degrees would be impossible in the plant because the water lines would freeze. According to Miller, most of the employees who worked in the hotbox asked for the assignment and that several other employees were currently waiting to be assigned there. Regarding Holler's request to be assigned to the sewage job, Miller had little knowledge as to why he was not chosen but indicated that Holler's seniority at that time was in the "lower two thirds."

Regarding Holler's discharge on September 18, Miller testified that early in the morning he again spoke to Holler about his talking with employee weigher Joe Reed. Soon thereafter Marti arrived and he, Marti and Line Supervisor Defendorf conferred together about Holler's talking and, concluding that it had been a continual problem and continued to disrupt the line, and that all three of them had talked to Holler that morning, he and Marti together decided to discharge Holler. Miller indicated that Holler's talking was a problem throughout virtually his entire employment, but it did not get "a great deal worse" near the end of his employment.

Meryl W. Hart testified that on July 6 he went to the plant at Marti's request, whereupon Marti explained that there had been talk about a union in the plant, and that this talk had been traced to one particular employee. Hart indicated that he was familiar with the relationship of Respondent with the Amish people, and testified that although he did not remember the name of the employee involved, he suggested that they talk to the employee and explain the Company's benefits and further attempt to elicit from the employee the reason for his union favoritism. Hart further testified that in July he "tailor made a [new] grievance procedure" for Respondent and that in this connection he visited the plant again on July 23, 26, and 27.[18]

Jacobo Marti testified as president of Respondent and related that in "May or June" Miller told him that employee Holler had been talking about a union. Thereafter, he called labor consultant Hart for advice and the result was that Miller talked to Holler about the situation.[19] According to Marti, after Miller talked to Holler there was no further talk about any union. Marti testified that, to his knowledge, Holler had only worked in the hotbox once in either July or August. He related that during the summer months the hotbox temperature often rose above 90 degrees, but that the room was very comfortable in the winter.

Marti testified that on September 18 he arrived at the plant between 10 and 11 a.m. and immediately saw Holler talking with employee Joe Reed, who was weighing cheese. Marti indicated that he was "very much disturbed" and thereafter talked to Miller who informed him that both he and Line Superintendent Defendorf had spoken to Holler about talking to Reed earlier that morning. Marti related that when he went home for lunch that day he discussed the problem of Holler with his wife and that together they made the decision to discharge Holler.[20] Marti testified that he himself worked in the plant almost daily and he never actually saw Holler talking to other employees although he had received complaints from them regarding Holler. Marti readily conceded that he did not want any union in the plant, indicating that it would probably not cause him to close the plant but would "very definitely" cause "disruption." Marti added that "his producers . . . Amish people" and 20 to 25 Amish plant workers would be lost if the plant was unionized, further relating that the milk he used to produce cheese comes solely from the Association, which is composed of approximately 250 milk producers, only a few of whom are not Amish but sell through the Association.

B. *Evaluation of Law and Evidence and Initial Conclusions*

It is uncontested in this case that Respondent was strongly and firmly against any union and had knowledge of Holler's union desires and activities among the employees, and I so find. A most significant question raised by the testimony is when Holler's union activities commenced and took place. Holler contends early September, on the heels of his discharge, and President Marti, Personnel Manager Miller, and attorney Hart all contend it was no later than early July.[21] I find that in fact Holler's union activities did take place no later than early July, and I thus credit that testimony of Marti, Miller, and Hart over that of Holler in this regard.[22] I thus further find that Personnel Manager Miller's conversation with Holler took place on or about July 6. After talking to Marti and attorney Hart, Miller called Holler in and talked to him for, I find, the sole purpose of dissuading him from further union activities. He attempted to convince Holler that a union was not needed,

[18] For these services in July, Respondent paid Hart $600 and that check from Respondent, dated July 27, was admitted in evidence. Hart testified that after July he had no dealings whatsoever with Respondent regarding any union activities in the plant.

[19] Marti later conceded that Hart was probably right about the fact that the incident occurred approximately July 6.

[20] Marti's wife, Mary Jane, testified that her husband in fact came home for lunch on September 18 and that he was very upset and stated "he was having trouble with Walter Holler again." She indicated that her husband had complained about Holler on previous occasions. As a solution, she then suggested that he discharge Holler. Mary Jane Marti was a 50-percent stockholder in Respondent corporation and also was a corporate officer.

[21] Former employee Dallas testified that Holler spoke to him about a union in "September" but was uncertain whether it was 1978 or 1979. Dallas was so uncertain and vacillating that I find his testimony totally unreliable and discredit him completely. Unexplainably, no other employee was called to verify the time, nor was Line Foreman Defendorf, who Holler indicated was present among a group of some 15 employees in the lunchroom when he advocated and talked about the need for a union.

[22] Holler's testimonial story came in rapid fire fashion and without emotion, and as if he had committed the facts (as he told them) to rote memory. In later testimony he bordered on the incredible when he claimed the plant was 10 degrees in the winter. These and other remarks, together with his demeanor and manner, made it apparent to me that Holler's veracity in this case was highly questionable. I discredit substantial and significant portions of his testimony in favor of Marti and Miller in this case.

explaining existing benefits, and indicating that production could be increased, and thus wages could be raised. He also, I find, talked about a representative committee of employees,[23] and, by stating that the plant could not function without the Amish, made it clear to Holler, whether rightly or wrongly, that the plant would close if a union came in. The wage and plant "function" remarks by Miller, I find, constituted an improper promise of benefits and threat, and I shall conclude them to be violations of Section 8(a)(1) of the Act as alleged in paragraphs 7(a) and (c) of the complaint.[24]

On September 11, Personnel Manager Miller assigned Holler to work in the hotbox,[25] Miller conceded that the assignment had been made not only because he needed an additional employee there, but to remove Holler from the line because he was disrupting the line by talking. Holler testified that he felt the hotbox was oppressive, and that its temperature reached 115 to 120 degrees. Miller testified that the temperature averaged 85 to 90 degrees and it was a desirable place to work. Marti himself worked there frequently. Most if not all employees periodically worked in the room and the operations carried on there were indispensable to the plant's production. Other than the discredited testimony of Holler about one single incident, there is absolutely no evidence in this case that any of Holler's discussions or talking with other employees on the line involved a union.[26] I find that the hotbox assignment was not oppressive or discriminatory against Holler, and although made in part to take him off the line to prevent him talking to other employees, it was not out of fear or belief that Holler's talk could or did involve a union, but was accomplished to prevent slowing down the production line at the time. Accordingly, I find and conclude that Holler's assignment to the hotbox on September 11 was not violative of Section 8(a)(1) and (3) of the Act.

Regarding Holler's actual discharge on September 18, Marti arrived in the late morning, observed Holler again talking and also learned that both Miller and Defendorf had talked to Holler earlier that morning. To Marti, who became angry, this was the final blow. Holler had, in his judgment, been an excessive talker for a year and he had been talked to on many occasions. Whether out of anger or not, Marti ultimately decided to discharge Holler.[27] The evidence and creditable testimony in this case convince me that Holler's discharge was in no way motivated by his union activities several months previously.[28] I thus find and conclude that Holler's discharge on September 18 was not violative of Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact, initial conclusions, and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. That Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Walter W. Holler was an employee within the meaning of Section 2(3) of the Act.

2. That on or about July 6, 1979, Respondent threatened employee Walter W. Holler with plant closure if a union came in, and promised said employee increased wages and better working conditions without the need or benefit of a union, in violation of Section 8(a)(1) of the Act.[29]

3. That the unlawful conduct concluded in paragraph 2, above, and found herein, affected commerce within the meaning of Section 2(6) and (7) of the Act.

4. That other than the misconduct concluded in paragraph 2, above, Respondent has not violated the Act as additionally alleged in the complaint in this case, or otherwise.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and of the Act, I shall recommend that it be ordered to cease and desist therefrom,[30] and that it take certain affirmative action designed to effectuate the policies of the Act. I shall also recommend that Respondent be required to post appropriate notices at its New Wilmington, Pennsylvania, plant.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[23] Holler so testified, and Miller testified that he "could have" talked about such a committee.

[24] Par. 7(b) of the complaint alleges improper "interrogation" based on Holler's claim that Miller asked about the "status" of the Union. I find that no such inquiry was made. Par. 7(d) of the complaint alleges the promulgation of an unlawful no-solicitation rule, relying, it seems, on the tenure of the entire conversation as an implied directive not to further engage in union support and activities. I do not find such to be the case here. There was no direct mandate or any threat of discharge. The seed of dislike was most certainly planted, but no rule with sanctions was promulgated to Holler or any other employee. The violations of Sec. 8(a)(1), found above, are alleged by Respondent to be barred by the 6-month limitation rule in Sec. 10(b) of the Act. I find no merit in this contention. The initial charge was filed by Holler on December 17, 1978, and amended on February 11, 1979. Both contained the general "By the above and other acts" clause. The violations alleged in par. 7 of the complaint relate directly to Holler and his union activities, and were fully litigated in this case. In like manner, my findings that the violations occurred on or about July 6, and not in September as alleged in the complaint, are proper under Sec. 10(b) of the Act. See also *Monroe Feed Store*, 112 NLRB 1336 (1955).

[25] Holler testified that he was also assigned to the hotbox a half day, September 12 and 13.

[26] I here again note the lack of testimony of other employees like Joe Reed or Raymond Chropac, who were involved in the talking incident with Holler the day he was discharged.

[27] Holler indicated he was discharged later on that day and Miller testified that he and Marti jointly decided to discharge Holler. Marti and his wife testified that the decision was made when he came home for lunch that day. I find that Marti and Miller did come to an accord about Holler, but Marti, realizing the decision was somewhat impulsive decided to again mention the situation of Holler to his wife, who in effect sanctioned the discharge without hesitation by suggesting it.

[28] This finding is made after additionally analyzing the evidence and testimony in terms of the Board's recent holdings in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[29] I previously found herein that Miller did suggest and discuss the formation of a "committee" with Holler during their union conversation. Such a committee would constitute an employee bargaining tool and implies ultimately better working conditions.

[30] I shall also recommend that the additional "cease and desist" provisions of the Order be of the narrow variety, which I feel to be more appropriate in this case. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

ORDER[31]

The Respondent, Jacobo Marti & Sons, Inc., New Wilmington, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with plant closure if the employees became represented by a union or labor organization.

(b) Promising increased wages and better working conditions if employees refrain from supporting or joining a union or labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its plant and facility in New Wilmington, Pennsylvania, the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, in and about work areas and other areas as indicated above, including all places where notices to said employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint against Respondent be, and it hereby is, dismissed insofar as it alleges unfair labor practices not specifically found herein.

[31] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[32] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."